Supreme Court, U.S.
FILED

No. 101379

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In The

Supreme Court of the United States

JOHN R. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case the petitioner presented uncontested evidence in his motion for post-conviction relief (28 U.S.C. § 2255) that he was cognitively impaired at the time of his federal trial, and that his attorneys knew or should have known this, yet failed to investigate his mental status. The petitioner's 2255 motion was denied without a hearing in the district court, which also denied the defendant's motion for a certificate of appealability (COA).

The Court of Appeals for the Fifth Circuit also denied the defendant's motion for a COA, on the grounds that "[w]hen, as here, the district court has denied a motion on the merits, the movant must show 'that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.' *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). . . ."

Accordingly, the questions presented are:

(1) Was the Fifth Circuit's denial of a COA in this case contrary to this Court's decisions in *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003)?; and

(2) Whether a district court's unilateral denial of a valid 2255 claim involving contested issues of fact is a violation of the Due Process Clause when that denial is made without a hearing.

PARTIES TO THE PROCEEDING

All parties to this proceeding are contained in the caption to the proceeding.

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PETITION FOR A WRIT OF CERTIORARI

John R. Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported, but is found at App. 1-2.

JURISDICTION

The judgment of the court of appeals was entered February 7, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law;. . . .

28 U.S.C. § 2255(b) provides, in pertinent part:

> **(b)** Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court

> shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts provides as follows:

> **(b) Initial Consideration by the Judge.** The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

STATEMENT

I. The Trial Proceedings.

In June 2006, John R. Davis, a Louisiana physician, was charged with one count of attempted production of child pornography, in violation of 18 U.S.C. § 2251(a). This statute carries a mandatory minimum penalty of 15 years imprisonment. At the time he was indicted, Dr. Davis was 71 years old. He had no

criminal record, and no history of inappropriate sexual conduct.

As was established at Dr. Davis's trial, however, there was no "child," and there was no "pornography." Rather, what the Government offered as evidence was a series of internet "chat room" exchanges between Dr. Davis and an undercover agent posing as a 14 year-old girl. These sexually-oriented exchanges were both few in number (about 10), and intermittent, with intervals of as much as two months between the exchanges. The initial exchange was in June 2005, and the last one was in May, 2006. During one of the final exchanges, Dr. Davis asked the undercover agent/14 year-old girl to send him pictures of herself in the nude, "touching herself." This request formed the basis of the federal indictment against Dr. Davis.

At trial, Dr. Davis contended that he lacked criminal intent, and that the requested pictures did not constitute pornography within the purview of the statute. Both contentions were rejected by the jury, and by the judge. In January, 2008, Dr. Davis was sentenced to 200 months imprisonment. A timely notice of appeal followed.

One year later, in January, 2009, the United States Court of Appeals for the Fifth Circuit affirmed Davis's conviction and sentence in an unpublished *per curiam* opinion. *See United States of America v. John Davis,* No. 08-30154, Summary Calendar (5th Cir. January 7, 2009).

II. The Post-Conviction Proceedings.

A post-conviction review of the all the evidence, regardless of whether it was actually offered at trial, revealed the following: (1) Dr. Davis had no prior history whatsoever of inappropriate sexual conduct; and (2) Dr. Davis was in very poor health. By the time of his trial, he had experienced two heart attacks, bypass surgery, the removal of a large abdominal aneurism, and the installation of several cardiac stents. These events left Dr. Davis completely impotent.

In addition, a review of the trial evidence revealed that Dr. Davis had told a variety of inconsistent stories to the undercover agent/14 year-old girl, giving different ages (21, 24, 27), and different jobs (resident, physician). Moreover, the sexual content of the text messages sent by Dr. Davis – primarily a recitation of his sexual prowess – bordered on the delusional, given Davis's impotence.

Based on these factors, counsel conducting the post-conviction investigation thought it appropriate to have Dr. Davis tested to determine if he was cognitively impaired. This testing was done over a three-day period in October, 2009, under the supervision of Dr. Kevin Bianchini, a neuropsychologist who had been qualified as an expert in federal court on numerous occasions. A description of the tests administered, the specific results for each, and Dr. Bianchini's final report can be found at App. 26-61.

The report's conclusion was and is unmistakable: Dr. Davis is cognitively impaired, and it is likely that

he was so impaired at the time of the offense in question:

> It is my opinion that as a result of his various medical problems, Dr. Davis has neurocognitive impairments that are likely a reflection of cognitive decline and possibly something more significant, like the early manifestation of dementia. The patient has impaired performances on constructional tasks, attention-concentration, and executive functions, areas that are associated with this kind of impairment. Impulsivity and poor judgment are associated with these conditions and some of this was observable during the evaluation. Lastly, given the patient's history it is likely that these impairments were present during the period of time of the offenses.

App. 60.

Unquestionably, Dr. Davis's cognitive impairments were, and are relevant to both his culpability, and sentencing. Nevertheless, the possibility that Dr. Davis was impaired was never investigated by his trial counsel, even though trial counsel was aware of facts that put them on notice of the possibility of such impairments. Consequently, on February 25, 2010, post-conviction counsel moved to vacate Dr. Davis's conviction and sentence based on potential violations of his Sixth Amendment right to effective assistance of counsel. App. 16-25.

Although Dr. Davis's 2255 motion plainly set forth facts that would entitle him to relief, if proven, his 2255 motion was denied without a hearing. In fact, the district court did not even require a reply from the Government before it issued its order denying relief. App. 4-9.

Not surprisingly, the district court also denied Dr. Davis's subsequent motion for a Certificate of Appealability (COA). App. 3.

Thereafter, Dr. Davis sought a COA from the United States Court of Appeals. In his motion in the Court of Appeals, Dr. Davis specifically asked the Court of Appeals to grant him a COA, and to thereafter remand the matter to the district court for the evidentiary hearing that should have been granted at the outset. On February 2, 2011, the Court of Appeals denied Dr. Davis's request for the COA. In doing so, it held that "[w]hen, as here, the district court has denied a motion on the merits, the movant must show 'that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.' *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). . . ." Because the Court of Appeals has clearly erred in its resolution of Dr. Davis's motion for a COA, review by this Court is now sought.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Decision is in Direct Conflict with *Slack v. McDaniel* and *Miller-El v. Cockrell.*

Even a cursory review of Dr. Davis's 2255 motion discloses that he has set forth facts and made allegations, which, if proven, would entitle him to judicial relief. He offered substantial evidence that he was suffering from a mental disease or defect at the time of his offense, and he has alleged that his trial counsel knew, or should have known this, yet failed to investigate it.

The constitutional obligation of counsel to investigate the possibility of mental diseases or defects, once put on notice of their existence, is well established. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). Given this, it is plain that at a minimum, Dr. Davis was entitled to his day in court.

Although more than fifty years have elapsed since this Court's decision in *Machibroda v. United States,* 368 U.S. 487 (1962), the law governing when a hearing must be held on a 2255 motion remains unchanged:

> The statute requires a District Court to "grant a prompt hearing" when such a motion is filed, and to "determine the issues and make findings of fact and conclusions of law with respect thereto" unless "the motion and the files and records of the case conclusively

> show that the prisoner is entitled to no relief."

Machibroda v. United States, 368 U.S. at 494.

As the Court explained in *Machibroda*:

> We cannot agree with the Government that a hearing in this case would be futile because of the apparent lack of any eyewitnesses to the occurrences alleged, other than the petitioner himself and the Assistant United States Attorney. The petitioner's motion and affidavit contain charges which are detailed and specific. * * * "Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." *Walker v. Johnston* 312 U.S. 275, 287.
>
> *Machibroda*, 368 U.S. at 495.

The Anti-Terrorist and Effective Death Penalty Act (AEDPA) did not change this aspect of the law of habeas corpus – a point made clear by this Court in its decisions in both *Slack v. McDaniel*, 529 U.S. 473 (2000) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The words of the Court in *Miller-El v. Cockrell* are instructive here:

We conclude, on our review of the record at this stage, that the District Court did not give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial. The Court of Appeals evaluated Miller-El's application for a COA in the same way. In ruling that petitioner's claim lacked sufficient merit to justify appellate proceedings, the Court of Appeals recited the requirements for granting a writ under § 2254, which it interpreted as requiring petitioner to prove that the state-court decision was objectively unreasonable by clear and convincing evidence.

This was too demanding a standard on more than one level. It was incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1). AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief rather than to the granting of a COA.

The Court of Appeals, moreover, was incorrect for an even more fundamental reason.

> Before the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims. True, to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply. At the COA stage, however, a court need not make a definitive inquiry into this matter. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. *Slack,* 529 U.S., at 481, 120 S.Ct. 1595; *Hohn,* 524 U.S., at 241, 118 S.Ct. 1969. The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate.

Miller-El v. Cockrell, 537 U.S. at pp. 341-342.

According, this Court should grant the petition for certiorari, vacate the decision of the Court of Appeals, and remand the matter for further proceedings.

II. The Fifth Circuit Improperly Permitted the District Court to Make Findings of Contested Fact Without a Hearing, in Violation of the Due Process Clause.

The procedures to be followed when a 2255 motion is filed in a federal district court are unambiguous. Under § 2255(b), "*[u]nless* the motion and the files and records of the case *conclusively* show that the prisoner is entitled to *no* relief, the court shall cause notice thereof to be served upon the United States attorney, *grant a prompt hearing* thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." (emphasis added)

Unless the 2255 motion is dismissed at this initial stage, Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts (the Rules) requires the Government to respond: "If the motion is not dismissed, the judge *must* order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." (emphasis added).

Both of the above provisions were disregarded by the district court in this case. The record in this case did not, indeed could not demonstrate conclusively that Dr. Davis was entitled to no relief. Yet his motion was dismissed, without requiring a response – because the district court engaged in extensive

fact-finding that ostensibly made either a response or an evidentiary hearing unnecessary.

But on its face, the fact-finding engaged in by the district court impermissibly went well beyond the record. First, the district court rejected the findings of Dr. Bianchini, on the grounds that he was a neuropsychologist, not a 'real doctor': "[t]he defendant provides the opinion of a neuropsychologist, not a medical doctor, of his alleged cognitive defect/disorder in support of his Motion to Vacate" (App. 4). But while the district court may have had a personal preference for physicians, from a scientific perspective, a neuropsychologist is far better qualified to make the types of assessments needed for the claims Dr. Davis presented.[1]

In its reasons for judgment, the district court also faulted Davis for failing to produce certain types of evidence in support of his petition (App. 8). What the district court disregarded is that a motion for post-conviction relief is the *beginning of the proceeding*, not the entirety of the proceeding. While a movant under 2255 must make a *prima facie* showing that he or she is entitled to relief, the petition cannot, and should not be required to take the place of a hearing, at which evidence can be offered.

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[1] Neuropsychologists are routinely used for such purposes in capital cases, *see, e.g., Indiana v. Edwards*, 554 U.S. 164 (2008), and *Penry v. Johnson*, 532 U.S. 782 (2001).

Finally, acknowledging that perhaps there could be some factual basis for Davis's claims of cognitive impairment, the district court dismissed them by saying, in essence, 'everyone like Dr. Davis has this problem': "[g]iven the defendant's age and medical history, it is obvious that a similar man in a similar position would experience some cognitive impairment" (App. 9). This is neither true, nor could it be based on the district court's recollection or observations, nor is it found anywhere else within the district court record.

Conversely, if the statement is accepted as true, it was all the more reason to grant Dr. Davis a hearing on his motion. If he is in fact cognitively impaired, like "similar [men] in similar position[s]," then this was a fact which should have been considered by his defense counsel, and by the district court at any sentencing.

In short, the district court engaged in extensive "fact-finding" well beyond the scope of the actual record to justify its dismissal of the 2255 motion at the initial stage of the proceedings. Worse, the Fifth Circuit endorsed this practice, by denying the COA, with its request for a remand for an evidentiary hearing.

While time and resources do not permit an exhaustive review of all the requests for COAs filed in

the Fifth Circuit[2] – even from this particular district court – a quick review of some of the 2255 motions filed in this particular district court discloses that *none* of the other motions follow the disturbing pattern of this case. In no other instance was there a dismissal "on the merits," with fact-finding, with no response from the Government, and no evidentiary hearing. And in no other instance is there an endorsement of such practice by the Court of Appeals.

In *Miller-El,* this Court condemned the practice of resolving the merits of an appeal during the COA stage. Equally unacceptable is the practice of resolving the merits of a 2255 motion at the pleadings stage, when the resolution requires going beyond the record. Clearly, Dr. Davis's 2255 motion falls into the category of one

> . . . that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" *Barefoot,* [*v. Estelle*, 463 U.S. 880 (1983)] *supra,* at 893, and n. 4, ("sum[ming] up" the "'substantial showing'" standard).

Slack v. McDaniel, 529 U.S. at 484.

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[2] As of the date of this petition, there had been 264 requests for a COA filed in the Fifth Circuit in 2011. There were 855 such requests in 2010, and 886 such requests in 2009.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision of the Fifth Circuit Court of Appeals should be vacated, and the matter should be remanded for further proceedings.

Respectfully submitted,

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MAY, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-30594
USDC No. 6:10-CV-320
USDC No. 6:06-CR-60040-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN DAVIS,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Feb. 7, 2011)

ORDER:

John Davis, federal prisoner # 29837-034, has filed a motion for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion, challenging his conviction for attempted production of child pornography. Davis contends that (1) his trial counsel was ineffective in that he did not investigate Davis's mental state although counsel had been put on notice of the existence of Davis's mental disease or defect; and (2) the district

court erred in denying his § 2255 motion without conducting an evidentiary hearing.

To obtain a COA, Davis must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell,* 537 U.S. 322, 327 (2003). When, as here, the district court has denied a motion on the merits, the movant must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (internal quotation marks and citation omitted). Davis has not made such a showing. Accordingly, Davis's COA motion is DENIED.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA	**CRIMINAL CASE NO. 6:06CR60040-01**
VERSUS	**JUDGE HAIK**
JOHN R. DAVIS	**MAGISTRATE JUDGE HANNA**

CERTIFICATE OF APPEALABILITY

(Filed Aug. 26, 2010)

A final order having been filed in the above-captioned habeas case, the court, considering the record in this case and the requirements of 28 U.S.C. § 2253, hereby finds that:

✓ The certificate of appealability is DENIED because the applicant has failed to demonstrate a substantial showing of the denial of a constitutional right.

__ The certificate of appealability is GRANTED for the below reasons:

The applicant has made a substantial showing that the following issues constitute a denial of a constitutional right:

Signed at Lafayette, Louisiana, this 26th Day of August, 2010.

/s/ Richard T. Haik
Richard T. Haik, Sr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

UNITED STATES OF AMERICA	**CRIMINAL ACTION NO.: 06-60040**
VERSUS	**JUDGE HAIK**
JOHN DAVIS	**MAGISTRATE JUDGE HANNA**

REASONS FOR JUDGMENT

(Filed Apr. 29, 2010)

A. Facts

Before the Court is Defendant's Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed on February 25, 2010. The defendant was charged and convicted by a jury of one count of 18 U.S.C. §2251(a) – sexual exploitation of children. Defendant is presently in the custody of the Federal Bureau of Prisons, and is incarcerated at FCI Beaumont (Low), where he is serving a sentence of 200 months imposed by this Court.

The defendant, Dr. John Davis, appealed his conviction and sentence to the Fifth Circuit Court of Appeals. On March 10, 2009, the Fifth Circuit affirmed the defendant's conviction and sentence. The defendant raised three issues on appeal: (1) whether the government shown beyond a reasonable doubt that the defendant solicited a "lascivious exhibition" by requesting a sexy photograph from a putative minor in violation of 18 U.S.C. §2251; (2) whether a

conversation in an instant messaging conversation with an individual who represents that she is in the same state, and the individual is in fact in the same state, does the communication carry with it a sufficient interstate component such that Congress could constitutionally criminalize the conversation; (3) whether a sentence of two hundred months constitutionally excessive for a seventy-two year old man.

At trial, defendant was represented by Julian R. Murray, Jr., and Shawn M. Murray. Defendant was also represented in the District Court and on appeal by Michael S. Fawer.

B. Defendant's Contentions

Defendant first argues that he is being held in violation of the Sixth Amendment, specifically, in violation of his Sixth Amendment right to effective assistance of counsel at his trial and at all other proceedings held in the district court, including sentencing.

In support of his motion, Defendant attached a report from Dr. Kevin Bianchini, a neuropsychologist, who examined the defendant in October 2009. Dr. Bianchini opined that the defendant suffers from a mental disease or defect which existed at the time of his offense, and throughout the duration of his prosecution, trial, conviction, and sentencing.

Defendant argues that all counsel for movant either knew or should have known of the existence of

this mental disease or defect, as it was apparent from Dr. Davis' behavior and from his communication skills, or lack thereof. Defendant provides that his counsel failed to conduct any investigation into his mental state or status, although counsel had been put on notice of the existence of movant's mental disease or defect. Defendants submits that this failure to investigate a viable defense and mitigating factor violates movant's rights under the Sixth Amendment.

Defendant's second contention is that his Sixth Amendment right to effective assistance of counsel was also violated during trial and on appeal. Defendant argues that the district court erred in denying his motion to dismiss the indictment because §2251(a) is unconstitutional under the Commerce Clause. Defendant insists that his trial counsel knew, or should have known that withdrawing the motion to declare §2251(a) unconstitutional under the Commerce Clause would constitute a waiver of the issue. Thus, counsel deprived Dr. Davis of his right to effective assistance of counsel at trial. Further, defendant argues, the withdrawal of the motion was done without a knowing and intelligent waiver on the part of the defendant, further denying his right to effective assistance of trial counsel.

Defendant maintains that co-cousnels/appellate counsel also knew or should have known that the issue of the constitutionality of §2251 could not be raised on appeal as it had been waived. Raising the issue deprived Dr. Davis of effective assistance of counsel on appeal.

C. Law and Analysis

28 U.S.C. §2251(a) provides, "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

28 U.S.C. §2251(b) provides, "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

28 U.S.C. §2251(c) provides, "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing."

The defendant provides the opinion of a neuropsychologist, not a medical doctor, of his alleged cognitive defect/disorder in support of his Motion to Vacate. Dr. Bianchini opined that as a result of Dr. Davis' various medical problems, he suffers from neurocognitive impairments that are likely a reflection of cognitive decline and possibly something more significant, like the early manifestation of dementia. Dr. Bianchini also found that the defendant had impaired performances on constructional tasks, attention-concentration, and executive functions, areas that are associated with this type of impairment. Dr. Bianchini insists that impulsivity and poor judgment are associated with these conditions and some of this was observable during the evaluation of the defendant. Lastly, Dr. Bianchini observed that, given the defendant's history it is likely that these impairments were present during the period of time of the offenses.

Defendant's claim of ineffective assistance of counsel is baseless. Defendant has failed to provide any evidence that counsel should have known of his alleged "mental disease or defect." In the instant motion, Defendant did not provide the court with any specific instances or behavioral signs that would have indicated to trial counsel, appellate counsel, or even to the Court, that the defendant had a mental disease or defect. Also, the defendant has failed to provide the

Court with any proof that Counsel was put on notice of his alleged mental disease. Dr. Bianchini does not specifically state that the defendant has a "mental disease." He merely states that the defendant is cognitively impaired and that impulsivity and poor judgment are associated with this condition. Dr. Bianchini has failed to provide the Court with any authority to show that impulsivity and poor judgment are associated with cognitive decline. Given the defendant's age and medical history, it is obvious that a similar man in a similar position would experience some cognitive impairment. Additionally, Dr. Bianchini provides no explanation as to why these impairments would have been present during the period of time of the offenses.

Given the lack of evidence provided, the Court finds that the defendant's Sixth Amendment right to effective assistance of counsel has not been violated.

D. Conclusion

For the reasons set forth above, the defendant's Motion to Vacate, Set Aside, or Correct Sentence [Doc. 105] is hereby **DENIED**.

THUS DONE AND SIGNED this 28th day of April, 2010 at Lafayette, Louisiana.

/s/ Richard T. Haik
JUDGE RICHARD T. HAIK, SR.
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA	* **CRIMINAL NO: 06-60040-01**
V.	* **JUDGE RICHARD T. HAIK**
JOHN R. DAVIS	* **MAGISTRATE JUDGE PATRICK J. HANNA**

* * * * * * * * * * * * * * * * * * *

JOHN DAVIS'S PETITION FOR A CERTIFICATE OF APPEALABILITY

(Filed Jun. 14, 2010)

Comes now John R. Davis, who, through undersigned counsel, pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings in District Courts, moves this Honorable Court for a Certificate of Appealability regarding its judgment and reasons of April 28, 2010, which dismissed his petition under 28 U.S.C. § 2255. As grounds for this Petition for a Certificate of Appealability, John R. Davis shows that he is entitled to one as a matter of law with regard to each of the issues that will be raised in his appeal, these being: (1) whether the Court erred in denying his petition without an evidentiary hearing; (2) whether he received ineffective assistance of counsel at trial; and (3) whether he received ineffective assistance of counsel on appeal. With regard to each of these separate issues to be appealed, John R. Davis submits

that the Court erred in its reasons for judgment, and that a certificate of appealability should be issued.

As the Court is aware, 28 USC § 2255 provides that a hearing should be held on a petition for relief filed by one in federal custody, "[u]nless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief. . . ." (emphasis added). The files and records of this case showed no such thing.

Although the Court found that Davis's claim of ineffective assistance of counsel was "baseless," that conclusion was based on findings that could and should only have been made after an evidentiary hearing. The Court criticized Davis because Davis " . . . failed to provide any evidence that counsel should have known of his alleged "mental disease or defect," and denied the claim because "Given the lack of evidence provided, the Court finds that the defendant's Sixth Amendment right to effective assistance of counsel has not been violated."

It is hornbook law that the legal sufficiency of a petition for post-conviction relief is measured by the allegations contained therein, not by the evidence that may or may not be submitted with the petition. Where there is a factual dispute, which there plainly is in this case, and if the resolution of that factual dispute in the defendant's favor would warrant relief, which is also the case here, the Fifth Circuit has consistently required that an evidentiary hearing be held. *See United States v. Smith*, 915 F.2d 959, 964

(5th Cir. 1999); and *United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991) – where the allegations of a petition are not negated by the record, a district court is *required* to hold an evidentiary hearing to resolve the allegations, which if true, would support the claim of a denial of constitutional rights.

Here, Davis has offered specific, uncontradicted evidence of a mental disease or defect. Although the Court criticizes that evidence because it is from "a neuropsychologist, not a medical doctor," a neuropsychologist is actually the best type of professional to make the determinations required in this case. Davis has also offered evidence that this mental disease or defect existed at the time of his trial and his sentencing. In addition, he has alleged that his trial counsel knew, or should have known of this mental disease or defect, and that their failure to investigate a matter that clearly had a bearing on his intent and that was plainly relevant to his sentencing, was ineffective assistance of counsel.

But rather than grant a hearing, the Court simply proceeded to make its own factual findings, none of which are supported by the record in this case – *e.g.*, "Given the defendant's age and medical history, it is obvious that a similar man in a similar position would experience some cognitive impairment." Here, Davis has produced "independent indicia of the likely merit of his allegations." A hearing was plainly warranted, and it was error for this Court to fail to grant one. *See United States v. Edwards*, 442 F.3d 258, 264 (5th Cir. 2006).

The legal test for issuance of a COA is whether reasonable jurists could debate that the petition should have been resolved in a different manner. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38, 123 S.Ct. 1029, 1039-1041 (2003).

> We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. . . . [Rather,] the petition must demonstrate that reasonable jurists would find the district court's assessment of the constitution claims debatable or wrong.

Id. at 338.

Certainly, reasonable jurists could debate this Court's determination that no hearing in this matter was necessary. Reasonable jurists could also debate whether the matter should have been resolved without even requiring the Government to respond to the allegations. Ultimately, reasonable jurists could also debate whether Davis's trial counsel should have investigated the possibility that he was suffering from a mental disease or defect and whether he received ineffective assistance of counsel on appeal. Consequently, this Court should grant a Certificate of Appealability on all three issues in Davis's 2255 petition.

Lafayette, Louisiana, this 14th day of June, 2010.

Respectfully submitted,

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Attorneys for DR. JOHN R. DAVIS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA	**CRIMINAL CASE NO. 6:06CR60040-01**
VERSUS	**JUDGE HAIK**
JOHN R. DAVIS	**MAGISTRATE JUDGE HANNA**

CERTIFICATE OF APPEALABILITY

A final order having been filed in the above-captioned habeas case, the court, considering the

record in this case and the requirements of 28 U.S.C. § 2253, hereby finds that:

___ The certificate of appealability is DENIED because the applicant has failed to demonstrate a substantial showing of the denial of a constitutional right.

___ The certificate of appealability is GRANTED for the below reasons:

The applicant has made a substantial showing that the following issues constitute a denial of a constitutional right:

Signed at _____, Louisiana, this ____ Day of _____, 2010.

_____
Richard T. Haik, Sr.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

UNITED STATES OF AMERICA	* **CRIMINAL NO: 06-60040-01**
v.	* **JUDGE RICHARD T. HAIK**
JOHN DAVIS	* **MAGISTRATE JUDGE PATRICK J. HANNA**

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JOHN DAVIS'S MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY[1]

(Filed Feb. 25, 2010)

COMES NOW John Davis, through undersigned counsel, and respectfully moves this Honorable Court, pursuant to Title 28, United States Code, § 2255, for the entry of an order vacating, setting aside, or correcting his sentence. In support of this motion, John Davis shows that:

1. John Davis is presently in the custody of the Federal Bureau of Prisons, and is incarcerated at FCI Beaumont (Low), where he is serving a sentence of 200 months.

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[1] This petition conforms to the form found in the "Appendix of Forms" set forth following the "Rules Governing Section 2255 Proceedings for the United States District Court."

2. He was convicted in the United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division, proceedings #06-60040-01.

3. Movant was sentenced on January 29, 2008, and the judgment of conviction was entered on January 31, 2008. Movant was sentenced to 200 months in the custody of the Attorney General, to be followed by five years supervised release. Movant was fined $50,000.

4. Movant was charged with, and convicted of one count of 18 USC § 2251(a) – sexual exploitation of children.

5. Movant entered a plea of not guilty to the one count indictment.

6. Movant was tried by a jury.

7. Movant did not testify at any pre-trial hearing; or at his trial; or at any post-trial hearing.

8. Movant appealed from his judgment of conviction.

9. Movant appealed his conviction and sentence to the United States Court of Appeals for the Fifth Circuit. The appeal was given docket number 08-30154 in that court. Movant's conviction and sentence were affirmed by that court, and judgment was entered, and issued as mandate on March 10, 2009. The opinion issued by the Court of Appeals is unpublished, and thus not reported.

10. Movant raised three issues in his direct appeal, these being:

    a. Where the only conduct allegedly proven by the Government consisted of a request for a "sexy" photograph from a putative minor, no specific photograph was ever requested and there existed no detail as to what "sexy" meant, has the Government shown beyond a reasonable doubt that a criminal defendant solicited a "lascivious exhibition" in violation of 18 U.S.C. § 2251?;

    b. Where a defendant participates in an Instant Messaging conversation with an individual who represents that she is in the same state, and the individual is in fact in the same state, does the communication carry with it a sufficient interstate component such that Congress could constitutionally criminalize the conversation?

    c. Is a sentence of two hundred (200) months constitutionally excessive for a seventy-two year old man who engaged in one (1) alleged conversation and the offensive conduct lasted less than a minute.

    Movant did not file a petition for certiorari in the United States Supreme Court.

11. Other than the direct appeal listed above, movant has not filed any other motions,

petitions, or applications concerning this judgment of conviction in any court.

12. As grounds for relief, movant hereby raises the following:

GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND SENTENCING

(a) Movant avers that he is being held in violation of the Sixth Amendment to the United States Constitution, specifically, in violation of his Sixth Amendment right to effective assistance of counsel at his trial, and in violation of his Sixth Amendment right to effective counsel at all other proceedings held in the district court, including sentencing.

The facts that support this claim are as follows: As can be seen from the report from Dr. Kevin Bianchini, attached hereto as Exhibit A, which is specifically incorporated in this motion by reference, as though copied *in extenso*, movant suffers from a mental disease or defect. Moreover, movant suffered from this mental disease or defect at the time of his offense, and throughout the duration of his prosecution, trial, conviction, and sentencing.

This mental disease or defect was relevant to the question of whether movant was entrapped by the conduct of the Government's agent; it was relevant

to the question of whether movant had the requisite specific intent to violate the statute with which he was charged; and it was relevant to the question of whether a departure from the sentencing guidelines was appropriate in this case.

All counsel for movant either knew, or should have known of the existence of this mental disease or defect, as it was apparent from Dr. Davis's behavior, and from his communication skills, or lack thereof; or it was otherwise readily discernible; or it was discernible upon a routine inspection of movant's medical records; or it would have been discovered by a routine investigation into movant's medical history, and/or his mental status at the time of trial.

Counsel for movant failed to conduct any investigation into movant's mental state or status, although counsel had been put on notice of the existence of movant's mental disease or defect. This failure to investigate a viable defense and mitigating factor violates movant's rights under the Sixth Amendment.

(b) This issue was not raised on direct appeal, as claims of ineffective assistance of counsel must be raised in collateral proceedings.

(c) This issue has not heretofore been raised in any post-conviction proceedings, as there have not been any previous post-conviction proceedings.

GROUND TWO: INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AND ON APPEAL

(a) As can be seen from Paragraph 10 above, appellate counsel raised three issues on appeal, the second of which was that "the district court erred in denying his motion to dismiss the indictment because § 2251(a) is unconstitutional under the Commerce Clause."

However, the Court of Appeals refused to consider this claim, for the following reasons (as set forth in the opinion of the Court of Appeals):

Davis's counsel filed a motion to dismiss the indictment for lack of jurisdiction on the ground that § 2251 was unconstitutional under the Commerce Clause. On the first day of the trial, Davis's counsel advised the court that Davis and the Government had entered into a stipulation regarding the interstate commerce aspect of the charged offense and, therefore, Davis was withdrawing his previous motion to dismiss the indictment on Commerce Clause grounds. Because Davis raised this issue in the district court and subsequently withdrew the motion raising the issue,

Davis waived this issue, and it is unreviewable.

Trial counsel for movant knew, or should have known that the withdrawing the motion to declare § 2251 unconstitutional under the Commerce Clause would constitute a waiver of the issue; thereby depriving petitioner of his right to effective assistance of counsel at trial. Moreover, the withdrawal of the motion was done without a knowing and intelligent waiver on the part of movant; further denying movant his right to effective assistance of trial counsel.

Moreover, appellate counsel knew, or should have known that the issue could not be raised on appeal, as it had been waived. Accordingly, raising the issue deprived movant of effective assistance of counsel on appeal.

Movant avers that the issue of whether the statute is constitutional is one which on which reasonable jurists may differ, and that accordingly, it is an issue which should have been preserved at trial, in order to present it on appeal.

(b) This issue was not raised on direct appeal, as claims of ineffective assistance of counsel must be raised in collateral proceedings.

(c) This issue has not heretofore been raised in any post-conviction proceedings, as there have not been any previous post-conviction proceedings.

13. Neither ground for relief has heretofore been presented in any federal court. Neither ground has been presented because claims of ineffective assistance of counsel cannot be raised at trial, or on direct appeal.

14. Movant does not have any motion, petition, or appeal now pending in any court.

15. Movant was represented at all stages of this proceeding, from initial appearance, through his appeal by:

a. Julian R. Murray, Jr.
One Galleria Boulevard, Suite 1100
Metairie, Louisiana 70001
504-833-5600

Movant was also represented at trial by:

b. Shawn M. Murray
One Galleria Boulevard, Suite 1100
Metairie, Louisiana 70001
504-833-5600

Movant was also represented in the district court, and on appeal by:

c. Michael S. Fawer
301 North Columbia Street
Covington, Louisiana 70433
985-871-7200

16. Movant was not sentenced on more than one count of the indictment.

17. Movant does not have any future sentence to serve.

18. TIMELINESS OF MOTION: This motion is timely as it is being filed within one year of the date on which movant's judgment of conviction became final. Petitioner's petition for rehearing in the United States Court of Appeals for the Fifth Circuit was denied on March 2, 2009, and the Court of Appeals issued its judgment as mandate on March 10, 2009.

Therefore, movant respectfully requests that the United States be required to file an answer responding to this motion; and that thereafter a hearing be held, and that following the hearing, that there be judgment herein, vacating and setting aside movant's conviction and sentence, and any other relief to which he may be entitled.

Lafayette, Louisiana, this 25th day of February, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25th, 2010, I electronically filed the foregoing pleading with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ William L. Goode
WILLIAM L. GOODE

[LOGO]

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NEUROPSYCHOLOGICAL EVALUATION

(Filed Feb. 25, 2010)

Patient's Name:	**John Davis**
Sex:	**Male**
Age:	**74**
Date of Birth:	**07/07/1935**
Education:	**Medical Doctor**
Handedness:	**Right**
Dates of Testing:	**10/14, 15, & 16/09**
Location:	**Beaumont, TX**
Psychometrist:	**Jesse Smotherman, B.S.**
Date of Report:	**02/02/10**
Referred by:	**William L. Goode, Attorney at Law & Mr. Herb Larson, Attorney at Law**

PROCEDURES ADMINISTERED

Review of Records	MMPI-2
Clinical Interview	Modified Somatic Perception Questionnaire

Boston Naming Test
California Verbal Learning Test-II
Clock Drawing
Comprehension-Commands
Conners' Continuous Performance Test II
Controlled Oral Word Association (FAS)
D-KEFS Proverbs Test
Finger Tapping Test
Grooved Pegboard Test
Sullivan Pain Catastrophizing Scale
Memory for Sentences
Pain Disability Index
Benton Facial Recognition Test
Animal List Generation Test
NAB Screening & Orientation
Portland Digit Recognition Test
Reitan-Aphasia Screening
Rey-Osterreith Complex Figure
Stroop Color-Word Test
TOMM
Trail Making Test (A & B)
Wechsler Adult Intelligence Scale III
Wechsler Memory Scale III
Wechsler Test of Adult Reading
Wide Range Achievement Test 3
Wisconsin Card Sorting Test
Word Memory Test

REFERRAL QUESTION:

Dr. Davis was arrested, in 2006 and subsequently convicted of attempted production of child pornography. He was referred to this examiner as part of

efforts by current defense counsel for post-conviction relief. The purpose of this evaluation was specifically to evaluate Dr. Davis and to investigate the issues of cognitive and neurocognitive impairments.

RELEVANT HISTORY:

John Davis is a 74-year-old patient who was seen in Beaumont, Texas, for a neuropsychological evaluation at the request of his attorneys, Mr. William Goode and Mr. Herb Larson. Dr. Davis was informed that the current evaluation was requested as part of his legal case and that therefore the results would be shared with attorneys, doctors, and others involved in the case. In this regard, he was explicitly informed that the results of the current evaluation would not be confidential. He understood this and agreed to participate.

The information that follows in this section was provided by Dr. Davis during his interview with this examiner. He spoke rapidly at times and at times volunteered information without prompt.

Dr. Davis stated that he is not sure of the date of the things he has been convicted of; he believes it might be 2006, but again said he was not sure. The trial was held in Lafayette. He stated that during the trial it was said that he had an hour or so of conversation with a federal officer.

He was asked if he had any medical symptoms. He stated he had a couple of wives and had trouble

with girlfriends. He sleeps well and does not have appetite problems. He indicated he does not have the memory he had before and is not as smart as he used to be. For example, he does not remember the name of the psychiatrist from the trial. He stated he had physical symptoms and problems for a number of years. In 1990, he had heart surgery and was put on a heart-lung machine. In 2004, he had surgery for an abdominal aneurysm that was done in Texas. He also has had cardiac stents. While having a facelift, he had cardiac arrest. The facelift surgery was being performed by Dr. Gendler at St. Charles General Hospital in New Orleans. He reports he was on the ventilator for two days after the cardiac arrest. He states he is quite depressed about home, post-Katrina. He states that after an operation in his 60's, he became impotent. He saw Dr. Neil Baum who gave him oral medication that did not help. He indicated that after prostrate surgery, he had to use injections to achieve an erection but these stopped working. He indicated he lost vascular supply to the pelvis after the abdominal surgery, which made the erectile dysfunction worse. This was discussed in his trial with a statement from Dr. Baum.

He felt depressed, after the change in his erectile function. He stated that when he had girlfriends, he would try to satisfy them but was not able to have an orgasm because of the erectile problems; he knew this was not going to get better. He stated he would not do an implantable pump because of the experience he had as an anesthesiologist.

Dr. Davis also reports he has trouble finding words and notices he loses simple words sometimes.

Dr. Davis states he had two divorces during various times and this and was depressing because he had to give half of his money to both wives. His second wife got one million dollars, which he said was half of everything he had earned his whole life. He stated he was married for 10 years but the marriages were probably over after two years but he stayed with them because he did not want the financial hardship. His first marriage was from 1955-1969; the second marriage was in the later '70's until 1990. He stated his first wife did not get a very large settlement. He has one son and one daughter from his first marriage. He states he took care of them and both are educated. He reports another depressing relationship. He had a girlfriend who was a nurse and they lived together. She died of lupus. He took care of her physically and financially and helped her through it. He stated he had two very close relationships for quite a few years.

He then volunteered that he has never had treatment for mental illness or counseling. He states he never went to marriage counseling with a priest. He volunteered that he was not faithful to his first wife. He states he would go out with nurses and had several affairs; this caused the divorces in both marriages. He states he has never taken medication for depression or for anxiety.

He reports he was taking the following medication at the time of the offense:

- Atenolol
- Statin for cholesterol
- Aspirin
- Flomax for his prostrate
- Valium for sleep that he took occasionally

He indicates he smoked a lot of cigarettes from the time he was 25-years-old until he went to prison at age 70. He estimates he smokes 1-1.5 a day. He denies drinking alcohol regularly and only has some wine with dinner. He denies using recreational drugs.

He states he has had his carotids examined (three ultrasounds) but there were not enough changes to warrant surgery. He said the bruits could be heard on exam.

He denies anxiety problems. He denies anger problems. He has not noticed problems or changes in behavior, but he noticed many changes through the period of the procedures. He states he also notices trouble finding words and names; e.g., he cannot remember the name of the prisoner he rooms with. He stated he learns things and then forgets them. He reports the angina has returned so he cannot work and exercise (he has to stop). He denies auditory or visual hallucinations. He denies nightmares. He denies paranoia. He denies having persecutory delusions. He denies suicidal ideation or intent, now or in the past. He denies homicidal ideation. He denies a history of unusual sexual behavior before this. He states he had a normal sexual life with adult females;

he was a single man with some money and could get girlfriends. He states he was 70 years old when he first went to a chat room and that he was not good with computers before this. He described the chat room as "like Playboy Magazine.", referring to the degree of sexual content/stimulation. He denies problems with dressing apraxia. He is able to tie his shoes, etc.

His past medical history is as follows: He has no history of head injury with or without a loss of consciousness. He played high school football (defensive back) and was "knocked around a lot" but denies any concussions. He did not box. He has no history of seizures, stroke, brain tumors, or brain surgery. He has no neurological history other than symptoms mentioned above. He has no psychiatric history. He was born with one testicle, which he indicates is always a little "psychological thing" and not a happy thing to have in his life. He indicates he has always felt a little insecure about this. He has smoked for 45 years. He has had high blood pressure since his 40's and has taken medication since it was diagnosed. He has cardiac disease: angina and has had a four vessel CABG. He has no other remarkable medical history.

Socially, as mentioned above, Dr. Davis was married twice. He is close to his two children from his first marriage. He has five grandchildren, three by his daughter and two by his son, and is close to all of them. His son lives in Florida and is married to his second wife. He has a child from both marriages.

In regard to his family of origin, his parents remained together throughout his childhood. He states his father was a physician, a country doctor, and a religious man who had little time for his family. He was the only doctor in the town and was a wonderful provider. He stated his father had three offices and worked too much. His father had no hobbies and they were not close because he was not around enough. His mother was a nurse and a devoted mother. He described her as wonderful, religious, affectionate, and loved her son more than anything in the world. His childhood was "wonderful" and "couldn't have been better." He stated he hunted, fished, and went out with girls. He has one older sister. Bother parents died of a heart attack. There was no mistreatment or abuse by either parent. Neither parent has a history of alcohol or substance abuse. There is no history of mental illness in the family.

Academically, Dr. Davis attended college at Northwestern University in Chicago for three years. After that, he went to medical school at Louisiana State University. By his account, he made A's and B's in school. He states he was good in all subjects. He has no history of learning disabilities or special education.

Vocational history: After completing medical school, Dr. Davis went into general practice for three months and then into the military. He was in the military for two years as a doctor in Oklahoma. He had no combat experiences. He then did a residency in anesthesia at Charity Hospital in New Orleans.

He then practiced as an anesthesiologist in New Orleans and in Shreveport.

REVIEW OF MEDICAL RECORDS:

In preparation of this report, I reviewed the following records provided to me by the attorneys:

- Lawrence Levy, M.D.
- Olle Kjellgren, M.D.

A History and Physical evaluation is dated January 26, 2000, and authored by Dr. Lawrence Levy. He refers to the patient having an elective facial surgery at Dr. Gendler's office. He indicates the patient did well through surgery and states, "However, postoperatively, patient became apneic with hypotension." He indicates the patient was seen in the recovery room and was brought to intensive care at St. Charles General Hospital for stabilization. He states the patient appeared hypoxic, hypotensive and was intubated and placed on fluids and dopamine. In the physical examination he describes the patient as agitated, cyanotic appearing male, and hypotensive. He refers to the initial blood gases at St. Charles ICU, however this must be the after the patient was being stabilized in the ICU.

A Discharge Summary from St. Charles General is dated January 30, 2000 by Dr. Lawrence Levy. He refers to the above event of the apnea and hypotension and that he was called STAT to see the patient. He indicates the patient has a history of coronary

artery bypass 12 years ago with Dr. Weickert and has been doing well without cardiac symptomatology. He describes the patient as appearing "hypoxic, hypotensive." He indicates he was felt to have a possible myocardial infarction and serial EKGs and enzymes were ordered. He describes the lab results. He indicates the x-ray studies revealed the chest x-ray showing cardiomegaly and a band of atelectasis on the right base. A January 27, 2000 x-ray revealed resolution of the subsegmental atelectasis. It indicates the patient was transferred to the floor on January 28, 2000 and is not stable and ambulatory. It indicates he is being cleared for discharge by cardiology and is asymptomatic. However, this suggests a period of days where he had symptoms. Discharge diagnoses include postop facial surgery, hypoxia, hypotension, acute non-Q-wave myocardial infarction, atherosclerotic heart disease, and hypercholesterolemia.

A report by Dr. Olle Kjellgren is dated October 22, 2006. He refers to first meeting and the patient in 2004 and the patient having a severe coronary artery disease and having undergone coronary bypass grafting in 1988. He indicates that the patient received an arterial graft of his left anterior descending coronary artery and three saphenous vein grafts. He indicates the patient had a small myocardial infarction at the time of this surgery and several years later another infarct. He indicates the patient was found to have a large abdominal aortic aneurysm in 2004. He indicates that as he had severe chest pain with minimal exertion it was felt he should undergo

cardiac catheterization prior to further evaluation of the aneurysm. He indicates that the angiogram revealed extensive coronary artery disease with significant progression. He notes occlusion of the saphenous vein graft to the diagonal branch. He makes reference to critical narrowing in the graft to the right coronary artery. He states that several stints were placed in this graft during a complex transcatheter interventional procedure. He indicates chest pain resolved and he was transferred to the Texas Heart Institute for the large abdominal aortic aneurysm that involved the renal arteries. He refers to the patient recovering, well but subsequently developing cholecystitis for which he needed laparoscopic surgery. He refers to problems being noted on stress tests including a maximum predicted heart rate that was only 69% of his predicted age-related maximum. He summarizes the results stating that the patient has quite extensive atherosclerotic vascular disease with two myocardial infarctions in the past, coronary bypass grafting, and a complex transcatheter interventional procedure in 2004. He indicates the patient has an extensive graft disease with one graft being intervened upon and moderate disease in another graft. He indicates the patient also has severe peripheral vascular disease with complicated surgery of the large abdominal aortic aneurysm. He indicates because of his extensive vascular disease, his long-term prognosis is guarded and his risk for further vascular event high.

A Report of Procedure performed at St. Luke's Episcopal Hospital in Houston, Texas, is dated June 2, 2004, and describes an aortic aneurysm repair, reimplantation of accessory right renal artery, and ligation of inferior mesenteric artery. The procedure is described in detail and the patient is released to recovery in a satisfactory condition. The discharge summary from Memorial Medical Center by Dr. Olle Kjellgren is dated July 13, 2004. Discharge diagnoses include acute cholecystitis, cholecystectomy, severe coronary artery disease, recent complex cardiac catheterization interventional procedure of right saphenous vein graft to right coronary artery, recent open abdominal aortic aneurysm repair, hypercholesterolemia, and hypertension.

A July 12, 2004 report by Dr. Richard Levine is from Memorial Medical Center, and refers to a request to see the patient because of urinary retention. Diagnosis of the doctor is urinary retention and benign prostatic hypertrophy. A Memorial Medical Center operative report is dated July 11, 2004. It indicates the procedure performed is laparoscopy, enterolysis of adhesions and endoscopic cholecystectomy. A Discharge Summary from Memorial Medical Center is dated May 26, 2004. Discharge diagnoses are crescendo angina pectoris, severe three-vessel coronary artery disease, previous coronary artery bypass grafting, successful PTCA and stenting of saphenous vein graft to the right coronary artery, large suprarenal abdominal aortic aneurysm, low HDL, hypercholesterolemia, and hypertension. An operative report

dated May 25, 2004, by Dr. Kjellgren describes a successful complex transcatheter interventional procedure of the saphenous vein graft to the right coronary artery using distal protection with a filter wire, along with a large abdominal aortic aneurysm involving the renal arteries.

A May 25 2004 consultation report is authored by Dr. Morrison Bethea. His impression is a large suprarenal abdominal aortic aneurysm, atherosclerotic coronary artery disease with a previous four-vessel coronary artery bypass, and successful stenting of multiple right coronary artery saphenous vein stenoses.

An ultrasound examination of the abdominal aorta dated May 19, 2004, shows a diffuse aneurysmal dilatation of the abdominal aorta with a maximum diameter of approximately 8.5 cm. Mentioned is the presence of an intramural thrombus.

A carotid ultrasound study is in the records dated August 20, 2005. The conclusion of the examiner is 40 to 50% diameter stenosis in the left internal carotid artery, less than or equal to 40% diameter stenosis in the right internal carotid artery.

BEHAVIORAL OBSERVATIONS:

John Davis was evaluated over a period of 3 days. He was consistently oriented to person, place and time. On each occasion, he arrived promptly and was well groomed and appropriately dressed. He walked independently and there were no auditory

problems reported or observed. Dr. Davis reported using glasses for both reading and distance, and he was observed to wear them during testing. Dr. Davis is right-handed.

Dr. Davis interacted with the examiner in a friendly and socially appropriate manner. His affect was normal and his emotions seemed stable and appropriate. He was at times, mildly disinhibited. There was no behavioral evidence of bizarre or unusual thinking. He had a normal recognition of errors and was not observed to perseverate or confabulate. He was neither withdrawn, nor impulsive and there was no evidence of bradykinesia.

RESULTS AND DISCUSSION:

Neuropsychological and psychological tests were administered as part of this evaluation. These tests were selected because they are generally well-constructed, valid and reliable measures of some aspect of mental functioning. These tests provide information about the patient's functioning within a given domain (sometimes multiple domains) and also have been found to potentially reflect various forms of brain damage through impaired scores. Thus, impaired level scores when properly interpreted in light of the medical history, overall test results and research on the injury/disease in question, can be an indication of brain impairment. However, it should be noted that it is generally the consensus among neuropsychologists that neuropsychological tests are more

sensitive than they are specific. Test abnormalities are sometimes found when multiple neuropsychological measures are administered in patients without brain impairment. It is the role and responsibility of the neuropsychologist to determine the most likely cause of a given deficit in the context of the medical records and available research on the disease/injury. This process includes the careful consideration of alternate causes for a given test result or deficit. No test result can be or should be used *in isolation* to rule out or diagnose brain or emotional dysfunction.

In this "Results and Discussion" section of this report, test results are reported in isolation. These findings are integrated (as above, with consideration of all available clinical information, research on the neuropsychology of the disease/injury and alternate explanations for the result) and a clinical opinion reported only in the summary section of this report.

Measures of Response Validity:

Portland Digit Recognition Test:

Easy	32/36
Hard	7/8
TOMM	**(cut-off 45/50 on Trial 2 & Retention)**
Trial 1	50/50
Trial 2	49/50
Retention	50/50

Currently, it is standard for neuropsychologists to administer tests that check the validity of a patient's

response on cognitive testing, particularly in medico-legal situations, wherein, something is to be gained from being impaired. Unlike most neuropsychological measures, the cut-offs on the measures and indicators of invalid cognitive test performance are designed to be more specific than sensitive. This means that some persons who are exaggerating or fabricating cognitive impairment may pass some or all of these measures. In contrast, persons who give good effort almost always perform normally.

Three symptom validity tests were administered in this evaluation. The TOMM is a 50-item recognition test for adults. There are two learning trials and a retention trial. A low score on the TOMM suggests memory impairment symptoms are false or exaggerated. Dr. Davis scored 49 out of 50 on Trial 2 and 50 out of 50 on the retention trial. These scores are within normal limits and do not indicate negative response bias. On the abbreviated version of the Portland Digit Recognition, he made 32 of 36 correct responses on the easy items and 7 of 8 correct responses on the hard items. These scores are within normal limits and do not indicate negative response bias. On the Word Memory Test (WMT) his immediate recognition score was 95 percent, delayed recognition was 95 percent, and consistency score was 90 percent. These scores are within normal limits and do not indicate negative response bias.

Techniques exist to examine validity of performance on standard neuropsychological measures. There is no indication of invalid performance on one internal consistency evaluation (Reliable Digits).

There is no indication of intentional poor performance/negative response bias on formal symptom validity measures.

General Intellectual Ability:

WAIS III		**FACTOR SCORES:**	
Verbal IQ	116	**Verbal Comprehension**	120
Performance IQ	97	**Perceptual Organization**	97
Full Scale IQ	108	**Working Memory**	111
		Processing Speed	91

VERBAL SUBTESTS:

		SS	%ile
Vocabulary	Word knowledge	11	63
Similarities	Verbal analogic reasoning abilities	15	95
Arithmetic	Numerical reasoning ability	12	75
Digit Span	Short-term auditory memory	14	91
Information	General Fund of knowledge	15	95
Comprehension	Common sense reasoning and social judgement	9	37
Letter Number Sequencing	Auditory working memory	10	50

PERFORMANCE SUBTESTS:

		SS	%ile
Picture Completion	Attention to visual detail	10	50
Digit Symbol-Coding	Visual motor speed	8	25
Block Design	Visual spatial analysis	6	9
Matrix Reasoning	Abstract fluid reasoning	13	84
Picture Arrangement	Planning and sequencing	11	63
Symbol Search	Visual scanning and processing	9	37

The Wechsler Adult Intelligence Scales is the most commonly used test of individual adult intelligence administered by psychologists. The WAIS III consists of 14 subtests composed of 7 verbal subtests and 7 predominately nonverbal or performance subtests. The WAIS III can be divided into 4 major functional categories consisting of: [1.] Those measuring old, over learned verbal capacities (Information, Similarities, and Vocabulary); [2.] Those involving spatial problem-solving (Picture Completion, Block Design, and Matrix Reasoning); and [3.] Working Memory abilities (Arithmetic and Digit Span); and [4.] Processing Speed (Digit Symbol-Coding and Symbol Search). Test scores yield a Verbal IQ, a Performance IQ, and a combined Full Scale IQ. Each subtest has a Mean or Average of 10. An Average IQ score is 100.

Dr. Davis's performance on the WAIS III indicates that he currently has a Verbal IQ of 116, a Performance IQ of 97 and a Full Scale IQ of 108. This places him in the high average range of verbal functioning, the average range of performance functioning and the average range of full scale functioning. The following descriptive information pertains to statistical comparisons. Statistical differences are not always clinically meaningful. The difference between his Verbal and Performance IQ scores is statistically significant and age corrected norms reveal significant scatter among the subtests. Verbal analogic reasoning ability, short-term auditory memory, and general fund of knowledge are strengths. Visual motor speed and visual spatial analysis are weaknesses.

In an attempt to understand this patient's premorbid intellectual functioning, he was administered the Wechsler Test of Adult Reading, which incorporates both reading recognition and demographic methods of estimating premorbid intellectual functioning. All of the existing methods for estimating pre-morbid IQ are limited and provide approximations with wide margins of error. By this method his verbal IQ score was commensurate with expectations and his performance IQ score was below expected levels (ESVIQ = 119; ESPIQ = 113). In particular he has a reduced score on one of the subtests that measures constructional functions.

Attention and Concentration:

Trails A	70" (1)
T-Score	28
Range	Moderate
Trails B	113" (0)
T-Score	40
Range	Below Average

WMS III Working Memory	102
WAIS III Working Memory	111
WAIS III Processing Speed	91
WAIS III Digit Span	8
WAIS III Letter Number Sequencing	10

Stroop Test	**Raw Score**	**Age Corrected**	**T-Score**
Words	90	104	48
Colors	52	63	39
C/W	31	46	51
Interference		7	57

WMS III Spatial Span	**Raw Score**	**Scaled Score**
Forward	8	12
Backward	6	10

Attention is a complex multidimensional construct, which requires assessment of several somewhat dissociable components. The capacity to focus or channel attentional resource includes arousal, focused attention and sustained attention. Processing speed is also a component of this capacity sometimes referred to as deployment. Processing speed refers to how quickly someone can bring cognitive resources to bear on a task and manipulate information in working memory. The WAIS-III processing speed factor score of 91 does not suggest problems in this area.

Focused attention was assessed on both the Trail Making Test Part A and the Stroop Color Word Test. On Trail Making Test Part A, the subject is required to connect circles containing the numbers 1 through 25 in order. Dr. Davis completed Part A in 70 seconds with 1 error. This performance is in the moderately impaired range. On the Stroop Color and Word Test, he read 90 words, identified 52 colors and identified 31 colors with word interference (see T scores above, including the interference estimate). This performance is within normal limits. Sustained attention refers to the patient's ability to sustain their attentional focus over time without fatigue or error and was measured here with the Conner's Continuous Performance Test (CPT), which suggested attention problems like those seen in patients with neurologically mediated attention problems. He had no difficulty maintaining set on the Wisconsin Card Sort Test (0 failures to maintain set).

More complex attentional processes include the patient's ability to hold information in mind and then process it, even if distracted or required to divide attention among tasks, sometimes referred to as encoding/capacity. Span of attention refers to the patient's capacity to hold information in mind for a brief period of time. Verbal memory span was measured using the Digit Span Forward (88th percentile), Trial one of the CVLT II (4 items recalled, z-score=-1), Woodcock Johnson Memory for Sentences (77th percentile) and WMS-III Logical Memory I (scaled score =10). Visual memory span was measured with the WMS-III Spatial Span forward (scaled score = 12).

Resistance to Interference refers to how well someone can hold information in mind and resist distraction. It was evaluated by examining CVLT II List B performance (5 items, z-score = 0). Mental manipulation/divided attention refers to the patient's ability to hold information in mind, perform operations on it and output the results. This area was evaluated with the WMS-III and WAIS-III subtests which comprise the Working Memory Factors (index scores of 102 and 111 respectively), Trail-Making Test-B (113 seconds, T-score =40) and backward spans (digits: 86th percentile; spatial: scaled score = 10).

Impairments were noted on tests of attention and concentration.

Motor Functions:

Handedness	**Right**	
	Right	**Left**
Finger Tapping	27.6	32.0
T-Score	24	31
Range	Moderate to Severe	Mild to Moderate
Grooved Pegboard	113"	116"
Errors	0	0
T-Score	37	38
Range	Mild	Mild
WAIS III Coding	8	

The motor functioning part of the examination measures finger-tapping speed, dexterity of the hands to place the pegs in a wooden board, and visual motor

integration skills -- which measures speed of transferring written codes. These tasks are sensitive to brain injury especially to the frontal lobes.

Dr. Davis is right-handed. His overall body coordination appeared normal. His dominant right-handed Finger Tapping score of 27.6 is in the moderately to severely impaired range of performance. His left-handed Finger Tapping score of 32.0 is in the mildly to moderately impaired range of performance. These performances indicate deficits in upper extremity motor speed. He completed the Grooved Pegboard Test with his dominant right hand in 113 seconds with 0 errors. This performance places him in the mildly impaired range. The test was then completed with his non-dominant left hand in 116 seconds with 0 errors. This performance is in the mildly impaired range. His current age-corrected WAIS III Digit Symbol-Coding score of 8 is in the average range of performance

In summary, this patient has bilateral impaired performances on tasks of upper extremity motor speed and coordination.

Visual Perceptual & Constructional Functions:

Facial Recognition	
Corrected Score	43
Range	Normal
Block Design	6

Integrative visual skills including visual analysis, visual construction, spatial organization and planning

were evaluated. Visual analytic functions were evaluated using the Benton Facial Recognition Test on which Dr. Davis earned a score of 43, which is in the normal range. Drawing tasks evaluate the integrity of the patient's visual-perceptual function, spatial sense, and organizational ability. On the Clock Drawing Test, Dr. Davis' performance was within normal limits. The Rey-Osterreith Figure is an evaluation that measures visual organizational capacities, visual motor integration and planning as well as visual memory. On a copy of the figure, Dr. Davis's age-corrected scaled score of 10 is in the average range of performance. His WAIS III Block Design score indicates low average visual/spatial capacities. This score is at the bottom of the low average level (9th percentile, but when considering demographically corrected scores this is a moderate impairment).

An impaired performance is noted on a test of constructional abilities.

Language Functions:

Memory for Sentences	
Raw Score	51
%tile	77
Range	High Average
Boston Naming	54/60
T-Score	43
Range	Below Average
Aphasia Screen	0 Errors
WAIS III Vocabulary	11
WAIS III Comprehension	9
Follow a 3-Step Command	Able

	Total Words	T-Score
FAS Test (3 min)	26	37
Animal List	12	35

In the course of conversation with the examiner Dr. Davis showed normal fluency, articulation, animation and word finding. No paraphasic errors were observed. One measure of language function is auditory oral repetition. The Memory for Sentences measures this capability. He obtained a raw score of 51. This performance is in the high average range.

The Aphasia Screening Test is a screening examination, which measures various language capabilities on a single level, including basic comprehension, reading, naming, and repetition. His current performance on this examination indicated that 0 errors were made. In addition, Dr. Davis was able to follow a 3-step command on the Neurobehavioral Cognitive Status Examination.

The Boston Naming Test is a vocabulary test consisting of 60 pictures, ranging from simple high frequency vocabulary to rare words. The purpose of this test is to assess the ability to name pictured objects. Therefore it requires naming and also visual-spatial recognition abilities. Dr. Davis named 54 out of 60 objects. This score is in the below average range of performance.

The FAS-Test and the Animal List Generation Test measure associative verbal fluency (and retrieval). In the FAS Test, the subject is required to name, as quickly as possible, items that begin with a

targeted letter. In the Animal List Generation Test, the subject is asked to name as many animals as possible in a specified time period. Dr. Davis obtained a T-score of 37 on the FAS Test. This performance is in the mildly impaired range. He obtained a T-score of 35 on the Animal List Generation Test. This performance is in the mildly impaired range.

His age-corrected WAIS III Vocabulary score of 11 shows average word-knowledge. His current age-corrected WAIS III Comprehension score of 9 reveals average language comprehension.

An impaired performance is noted on a test of fluency/retrieval.

Academic Skills:

WRAT 3	**Percentile**	**Grade Level**
Reading Recognition	84	Post High School
Spelling	73	Post High School
Math	92	Post High School

Current reading, spelling and arithmetic, achievement levels were measured by the Wide Range Achievement Test-III (WRAT 3). His reading recognition is currently at the 84th percentile, current spelling capabilities are at the 73rd percentile and arithmetic calculation abilities are at the 92nd percentile. These findings are at expected levels – given his educational history.

Memory and New Learning:

WMS III PRIMARY INDICES		%ILES OF AUDITORY PROCESS COMPOSITS	
Auditory Immediate	108	**Single Trial Learning**	44
Visual Immediate	115	**Learning Slope**	80
Immediate Memory	114	**Retention**	70
Auditory Delayed	111	**Retrieval**	34
Visual Delayed	97		
Auditory Recognition Delayed	105		
General Memory	105		
Working Memory	102		

WMS III Paired Associates

Trials	Correct
1	1
2	6
3	7
4	7
Recall 30 Min.	7

WMS III Paragraph	Correct
Story 1	
1st Recall	10
Recall 30 min.	8

	Correct
Story 2	
1st Recall	10
2nd Recall	14
30 Min. Recall	10

CVLT II	Raw Score	T-Score
List of Trials 1 – 5	39	53
	Raw Score	Standard Score
List A Trial 1	4	-1
List A Trial 5	9	-0.5
List B	5	0
List A Short-Delay Free Recall	4	-1
List A Short-Delay Cued Recall	7	-1
List A Long-Delay Free Recall	6	-0.5
List A Long-Delay Cued Recall	7	-0.5
Recall Errors (List A & B)		
Perseverations (Free & Cued Total)	1	-0.5
Free Recall Intrusions (Total)	2	0
Cued Recall Intrusions (Total)	4	0.5
Recognition Measures		
Recognition Hits	14	0
Discriminability	2.3	0
False Positives	4	0
Response Bias	0	-0.5

Memory function encompasses short term and long term (or remote memory) forms. Learning processes of encoding, consolidation and retrieval are examined in visual and verbal modalities. These memory functions are among the most sensitive to brain injury and are measured on parts of the many

specialized neuropsychological tests including comprehensive memory batteries, like the Wechsler Memory Scale III (WMS III). His performance on this evaluation indicates that he has an Auditory Immediate Index score of 108 and a Visual Immediate Index score of 115. The difference between his Auditory Immediate and Visual Immediate Indices is not statistically significant. These obtained scores show auditory memory (acquisition) capabilities, which are commensurate with expectations, given his obtained IQ scores. His Visual Memory is commensurate with expectations, given his obtained IQ scores.

His Auditory Delayed Index score of 111 is in the high average range of performance. His Visual Delayed Index Score of 97 is in the average range of performance.

The California Verbal Learning Test II is a verbal memory evaluation, which requires the subject to learn a list of 16 words (four words from each of four semantic categories) over 5 trials. The results of this test are presented in tabular form directly above. Dr. Davis recalled 39 words, which is in the average range of performance. He benefited from repeated trials (List A Trial 1 = 4, z = -1; List A Trial 5 = 9, z = -0.5). He showed a normal learning curve (slope z-score = 0), and recalled consistently across trials (60, z-score = -1). The primacy/recency pattern is: 18, 49, & 33. These scores suggest normal capabilities in acquisition and retention of newly learned material.

On an immediate recall of the Rey-Osterreith figure Dr. Davis had an age-corrected scaled score of 9, which is in the average range of performance. A 30-minute delayed recall of the figure was in the average range of performance with an age-corrected scaled score of 9.

Dr. Davis's performances on test of new learning and memory are within normal limits.

Executive Functions:

	Total Words	T-Score
FAS Test (3 min)	26	37
Animal List	12	35

WAIS III Similarities	15
WAIS III Matrix Reasoning	13

WCST (drop trials to criterion)	Raw Score	T-Score	%ile
Total Trials	128		
Total Correct	71		
Total Errors	57	39	13
Perseverative Responses	23	47	37
Perseverative Errors	21	47	37
Nonperseverative Errors	36	29	2
Percent Conceptual Level Responses	41	39	14
Categories Completed	5		>16
Trials to Complete First Category	11		>16
Failure to Maintain Set	0		>16

Learning to Learn	-12.38	>16
Unique Responses (raw only)	16	

D-KEFS Proverbs Test	**Raw**	**SS**
Free Inquiry	22/32	10
Multiple Choice	30/32	(58th%-ile)
Common	16/20	10
Uncommon	6/12	10
Accuracy	10/16	10
Abstraction	14/16	11

Executive or higher cognitive functions refers to a variety of cognitive faculties normally attributed to the more recently developed aspects of the human nervous system (e.g., the frontal lobes), including initiation, mental flexibility and abstract reasoning. Initiation and access to semantic memory (retrieval) was evaluated by two list-generation tasks. The Controlled Oral Word Association Test (FAS) requires the subject to name as many words as possible beginning with F, A, and S. The Animal List Generation Test requires the patient to name as many four legged animals as he can. His performance on the FAS test was in the mildly impaired range. His performance on the Animals test was in the mildly impaired range.

Mental flexibility is measured by several tasks. The Wisconsin Card Sorting Test (WCST) is a measure of problem solving, mental flexibility and abstract thinking. The results of this test are presented in tabular form directly above. On the WCST he was able to solve the puzzle/problem quickly, stay on track

when he found the solution, and shift appropriately when a new strategy was required (his performance is within normal limits). His age-corrected WAIS III Similarities subtest score of 15 shows superior verbal analogic reasoning abilities; his WAIS III Matrix Reasoning subtest score of 13 shows high average abstract fluid (visual) reasoning ability.

His performance on a test of verbal abstract reasoning (D-KEFS Proverbs Test) was in the average range for both familiar and uncommon proverbs.

Impaired performances are noted on a test of problem solving and reasoning.

Social-Emotional Functioning:

MMPI-2

L	52	**4**	50
F	42	**5**	46
K	62	**6**	49
		7	43
1	59	**8**	51
2	54	**9**	39
3	64	**0**	45

John Davis was interviewed and was administered an MMPI-2. The results of the interview are discussed above. This patient's responses yielded a profile of acceptable consistency. A very mild degree of inconsistency is noted but it does not likely jeopardize the validity of the profile. There is no elevation on any of the measures of symptom exaggeration (F Family, FBS). The patient was not defensive.

The patient shows no clinical elevations on the MMPI.

SUMMARY AND RECOMMENDATIONS:

DIAGNOSIS:

294.9 Cognitive Disorder NOS

Dr. John Davis is a 74-year-old patient who seen after conviction while incarcerated at the FCI facility in Beaumont Texas. This evaluation was requested by his attorneys, Mr. Bill Goode and Mr. Herb Larson, to examine whether not neurocognitive or neuropsychological factors could have had some impact on the patient's behavior that led to his conviction and incarceration.

This evaluation consisted of an interview with Dr. Davis, the review of a set of medical records, and the administration of psychological and neurocognitive testing, including symptom validity testing.

Given the potential to gain from being impaired (potential change or reduction in sentence), symptom validity and exaggeration measures were included as part of this examination. Recent research suggests that the base rate of malingering among individuals who undergo neuropsychological evaluation in a criminal forensic context can be as high as 55%. Malingering/symptom exaggeration was thoroughly assessed; well-validated measures of symptom validity were included in this evaluation and were entirely negative. That is, there was no indication of exaggeration

of symptoms, nor was there indication of intentional poor performance on neuropsychological testing.

This patient has a number of positive findings on neuropsychological testing, including impairments in attention-concentration, constructional abilities, fluency/retrieval and problem solving/reasoning. This patient has an extensive medical history of problems that are well known to be associated with cognitive/neurocognitive compromise including a lengthy history of cardiovascular disease, hypertension and stenosis of the carotid vessels (the vessels that supply the brain). In addition, he had an acute event of significant hypoxia and hypotension that is documented in the medical records that I reviewed, which could cause reduced oxygen supply to the brain or reduced perfusion leading to damage.

It is my opinion that as a result of his various medical problems, Dr. Davis has neurocognitive impairments that are likely a reflection of cognitive decline and possibly something more significant, like the early manifestation of dementia. The patient has impaired performances on constructional tasks, attention-concentration, and executive functions, areas that are associated with this kind of impairment. Impulsivity and poor judgment are associated with these conditions and some of this was observable during the evaluation. Lastly, given the patient's history it is likely that these impairments were present during the period of time of the offenses.

The opinions expressed in this report are based in part on information provided to the examiner. The examiner reserves the right to change his opinion upon receipt of new information.

Thank you for this interesting consultation.

/s/ Kevin J. Bianchini
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This report is subject to transcription error.

This report is not to be shown or given to patients without consultation with Dr. Bianchini.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA	*	**NO: 10-30594**
	*	
V.	*	
	*	
JOHN DAVIS	*	

* * * * * * * * *

JOHN DAVIS'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Comes now John Davis, who, through undersigned counsel, pursuant to 28 U.S.C. § 2253, and Rule 11 of the Rules Governing Section 2255 Proceedings in District Courts, moves this Honorable Court for a Certificate of Appealability regarding the District Court's judgment and reasons of April 28, 2010, which dismissed Davis's petition under 28 U.S.C. § 2255. Davis's motion to the district court for a Certificate of Appealability was denied on August 26, 2010.

As grounds for this application for a Certificate of Appealibility, Davis shows that he was entitled to one as a matter of law with regard to each of the issues that will be raised in his appeal, these being: (1) whether the Court erred in denying his petition without an evidentiary hearing; (2) whether he received ineffective assistance of counsel at trial; and (3) whether he received ineffective assistance of counsel on appeal. With regard to each of these

separate issues to be appealed, Davis submits that the District Court erred in its reasons for judgment, and that it erred in its denial of his motion for a certificate of appealability, and that accordingly a certificate of appealability should be issued by this Honorable Court, all as is more fully explained in the brief submitted in support of this application.

New Orleans, Louisiana, this 25th day of October, 2010.

Respectfully submitted,

BY: /s/ Herbert V. Larson, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record, and interested parties, by transmitting a copy of same through the CM/ECF system, on this 25th day of October, 2010.

/s/ Herbert V. Larson, Jr.
Herbert V. Larson, Jr.